In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-446

WILLIAM T. DUNHAM and
MARY LOU DUNHAM,
husband and wife,

Appellants,

v.

CLACKAMAS COUNTY, a
political subdivision
of the State of Oregon,

Appellee.

On Appeal from the
SUPREME COURT OF THE STATE OF OREGON

MOTION TO DISMISS

KEITH KINSMAN
Assistant County Counsel
CLACKAMAS COUNTY COUNSEL
906 Main Street
Oregon City, OR 97045
Attorney for Appellee

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The Appellee moves the Court for an order dismissing the appeal herein on the ground that it is manifest that the decision of the Oregon Supreme Court is correct and that no substantial federal question is presented on this appeal.

I.

STATEMENT

On May 17, 1960, the Clackamas County Board of County Commissioners enacted the original Clackamas County Zoning Ordinance (hereafter "the Ordinance"). On December 14, 1967, the County made the Ordinance applicable to the property now owned by appellants, zoning it within a Recreational Residential District. Mobile homes were allowed in a Recreational Residential District in mobile home parks as conditional uses. Individual mobile homes were not permitted. In 1972 the Appellants purchased the property in question, then bought and installed a mobile home on the property. On April 4, 1975, the County brought a nuisance abatement action against the Appellants pursuant to ORS 215.185, a state statute which provides that structures being maintained or used in violation of county zoning ordinances may be abated as nuisances. The trial court found for the County and enjoined the Appellants from maintaining the mobile home as a residence on their property.

On appeal, a majority of a three member panel of the Oregon Court of Appeals reversed the trial court decision, on the basis that the County had not proved that the Appellants' mobile home was a "trailer house" as that term was defined in the original Ordinance. On review, the Oregon Supreme Court reversed the Court of Appeals, holding that the Appellants' mobile home was a "trailer house" under the Ordinance. In a footnote, the Court stated that the equal protection clause did not apply to classification of things rather than persons, and that even if the clause did apply, the classification in this case was sufficiently rational to avoid violating the equal protection guarantee.

The only question properly before the Court on this appeal is whether the original Ordinance provisions regulating mobile homes, in particular Sections 3.2 and 22.3 of the Ordinance, violated the equal protection clause of the Fourteenth Amendment. It is difficult to imagine how Section 3.2 involves an equal protection question, since it simply is a definition of "trailer house". The major issue in the Oregon appellate courts was whether this definition included the Appellants' mobile home, an issue finally decided against the Appellants; but this was purely a matter of statutory construction, having nothing to do with equal protection, and is not appropriate for decision by the Court on this appeal. The crux of Appellants' equal protection argument appears to be that Section 22.3 of the original Ordinance, which restricts mobile homes to mobile home parks in the Recreational Residential District, makes an impermissible classification in violation of the equal protection clause. Appellee asserts that this argument is clearly without merit and presents no substantial federal question.

II.

ARGUMENT

1. <u>"Strict Scrutiny" is not the proper test in this case</u>.

The Appellants contend that the Ordinance should be subjected to "strict scrutiny" by this Court. This position is clearly incorrect. Numerous decisions of this Court have firmly established that strict scrutiny will only be brought into the equal protection analysis when the legislation being challenged either discriminates against a "suspect class" or impinges on a "fundamental right". The Ordinance in question here does neither.

The Appellants apparently seek to hang their strict scrutiny claim on the "fundamental rights" hook, claiming that this Ordinance "affects the exercise of appellants' fundamental right to acquire, enjoy, own and dispose of property." Appellants' Jurisdictional Statement, p. 18. The fatal flaw in this argument is that the right to unrestricted use of one's property is not the type of interest that has been held to be "fundamental" for equal protection purposes. This is for good reason. If the Appellants' approach was adopted, this Court would in effect be agreeing to subject to strict scrutiny any sort of restriction on the use of any particular classification of property. As this Court has recently noted, "By its nature, zoning 'interferes' significantly with owners' uses of property." City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 675, n. 8 (1976). In addition to "interfering", zoning laws also by their very nature classify property. Therefore, under Appellants' theory, virtually all zoning laws would be subject to strict scrutiny. So too would a large number of other police powers of state and local authorities which involve classification and to one degree or another regulate the "right to acquire, enjoy, own and dispose of property".

Although not clearly expressed, Appellants' lengthy dissertation on the housing market seems to imply that the Ordinance also impinged on the public's rights to own their own homes and to have adequate housing. This argument adds no weight to Appellants' pleas for strict scrutiny, since this Court has established that the need or desire for a particular type or standard of housing is not a "fundamental right" for equal protection purposes. Lindsey v. Normet, 406 U.S. 56 (1972).

The Appellants, therefore, have not and cannot establish any recognized "fundamental right" being impinged upon by this Ordinance. Neither was there

any "suspect class" being discriminated against by this Ordinance.

The Appellants talk at great length about housing shortages and costs, and there is perhaps the suggestion that the Ordinance discriminates against poor people or against "that forgotten segment of American society known as the 'Middle Class'." Appellants' Jurisdictional Statement, p. 4. Even if one were to accept this theory, it has been established at least since San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), and James v. Valtierra, 402 U.S. 137 (1971), that lack of wealth does not make one a member of a "suspect class". (See also Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 [9th Cir., 1974], specifically discussing this point in the context of zoning that allegedly excluded low-cost housing.) Even if the Appellants were able to somehow delineate the composition of the class in this case, there is no way that such class would be "suspect" for equal protection purposes. The only other possible class here is the class of mobile home owners, even more obviously not a "suspect class" requiring the protection of strict scrutiny.

In sum, since the Ordinance singles out no "suspect class" and adversely affects no "fundamental right", it need not be subject to strict scrutiny.

2. The Ordinance's classification and treatment of mobile homes is Rational.

Since strict scrutiny is not involved here, this Court should only rule the Ordinance unconstitutional if it is "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare." Village of Euclid, Ohio v. Ambler Realty Company, 272 U.S. 365, 386 (1926). Put another way, the

the determination to be made is ". . .whether there is some ground of difference that rationally explains the different treatment. . ." accorded to trailer houses. Eisenstadt v. Baird, 405 U.S. 438, 448 (1972). The Appellee asserts that it is well within the legitimate police power of local government to distinguish between mobile homes and other types of residences, and that the specific restrictions put on the placement of mobile homes by the original Ordinance were reasonable and rational.

The general proposition that local governments have the authority under the police power to differentiate mobile homes from conventional housing and regulate their placement and use is so well established as to be beyond dispute. See, for example, 7 E. McQuillin, Municipal Corporations, § 24.564 (3rd Ed., 1968 rev. vol.); 101 C.J.S., Zoning, § 61 (1958); 2 R. Anderson, Law of Zoning, § 14.05 (2nd Ed., 1976), and cases cited therein. The Appellants apparently are arguing that the only reason for regulating the placement of mobile homes is aesthetics, that this is an insufficient reason, and that therefore an ordinance embodying such restrictions must be held invalid.

Aesthetics is one valid consideration in land use decisionmaking, as recognized by this Court in Berman v. Parker, 348 U.S. 26 (1954). A number of state courts have, in fact, held that aesthetics alone may be ample justification for land planning decisions, including the Oregon Supreme Court in Oregon City v. Hartke, 240 Or. 35 (1965). But, the Appellants are incorrect in their conclusion that aesthetics is the only reason for singling out mobile homes. The courts have recognized numerous other factors that distinguish mobile homes from conventional housing. A few of these factors (with examples of decisions recognizing them) include:

1. Mobile homes often pose unique problems in the provision of municipal services such as water and sewage, with attendant health problems. State v. Larson, 292 Minn. 350, 195 N.W.2d 180 (1972);

2. Mobile homes have historically depreciated in value, while conventional homes, relatively, have appreciated. Clackamas County v. Ague, 27 Or. App. 515, 556 P.2d 1386 (1976);

3. Mobile homes may be detrimental to property values in neighborhoods where they are situated. Town of Manchester v. Phillips, 343 Mass. 591, 180 N.E.2d 333 (1962);

4. The lesser value of mobile homes, as compared with other possible developments on the land, results in comparatively less tax revenues. Vickers v. Township Committee Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962), appeal dismissed, 371 U.S. 233 (1963);

5. The presence of mobile homes may result in a more transient population within a neighborhood where they are situated. Town of Yorkville v. Fonk, 3 Wis.2d 371, 88 N.W.2d 319 (1958);

6. Mobile homes may hinder the orderly and beneficial development of particular localities. Napierkowski v. Gloucester Township, 29 N.J. 241, 150 A.2d 481 (1959).

The presence of factors such as these has led to the overwhelming consensus of the courts that mobile homes do indeed differ from conventional housing and that in the promotion of the general welfare they may be treated accordingly.

Assuming that mobile homes may properly be singled out for special treatment, the question is whether the specific treatment accorded this class of residence by the original Ordinance was

reasonable. The basic restriction on mobile homes in the Recreational Residential District is that they are only allowed in mobile home parks. This scheme obviously reflects a legislative judgment that the problems inherent in mobile homes are best dealt with by grouping mobile homes together in appropriate areas. At the time the suit in this case was initiated, mobile homes were also allowed in mobile home parks in a large number of other zoning districts as conditional uses, and individual mobile homes were permitted outright in another type of district. (A 1976 amendment to the Ordinance allows individual mobile homes in a number of residential districts, but in Recreational Residential Districts they are still restricted to mobile home parks. The bulk of Recreational Residential District land is in scenic areas located around Mt. Hood and the corridor between Portland and Mt. Hood.)

This type of legislation, restricting mobile homes primarily to mobile home parks, is certainly not arbitrary or unreasonable. Almost all courts that have considered the question have held that it is permissible for local authorities to restrict mobile homes to mobile home parks. A few of the many cases so holding are State v. Larson, supra; Wright v. Michaud, 160 Me. 164, 200 A.2d 543 (1964); Napierkowski v. Gloucester Township, supra; Town of Manchester v. Phillips, supra; City of Colby v. Hurtt, 212 Kan. 113, 509 P.2d 1142 (1973); People v. Clute, 18 N.Y.2d 999, 278 N.Y.S. 2d 231, 224 N.E.2d 734 (1965); Matherville v. Brown, 34 Ill. App. 3d 298, 339 N.E.2d 346 (1975).

In conclusion, the vast weight of legal authority holds that it is reasonable, in promotion of the general welfare, to single out mobile homes in zoning legislation and that it is reasonable to restrict mobile homes to mobile home parks. The Appellants counter with policy arguments that it would be better to loosen zoning restrictions to

allow more mobile homes and allow them on individual lots. But the question before this Court is the constitutionality of the original Clackamas County Zoning Ordinance, not its wisdom. A recent decision of this Court, Warth v. Seldin, 422 U.S. 490 (1975), although dealing primarily with a standing question, aptly states the fundamental weakness of this appeal:

> We also note that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authority. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process. 422 U.S. at 509, n. 18.

Appellants' arguments properly belong before the state or local legislative bodies, not before this Court.

III.

CONCLUSION

For the foregoing reasons, there is no substantial federal question before the Court, and this appeal should be dismissed.

Respectfully submitted,

/s/ Keith Kinsman

Keith Kinsman
Counsel for Appellee

Clackamas County Counsel
906 Main Street
Oregon City, OR 97045
(503) 655-8362